Functioning and Independence of the Constitutional Court of Spain: Guarantees and Challenges

Arzoz, Xabier

Veröffentlichungsversion / Published Version
Arbeitspapier / working paper

Rechtspolitisches Forum

79

Functioning and Independence of the Constitutional Court of Spain: Guarantees and Challenges

von

Prof. Dr. Xabier Arzoz LL.M. (Saarbrücken)
University of the Basque Country
Legal Counsel at the Constitutional Court of Spain

IRP Institut für Rechtspolitik
an der Universität Trier

Impressum

Herausgegeben von Prof. Dr. Thomas Raab und Prof. Dr. von Ungern-Sternberg unter Mitarbeit von Camilla Haake und Claudia Lehnen.

Institut für Rechtspolitik an der Universität Trier · D-54286 Trier
Telefon: +49 (0)651 201-3443 · Telefax: +49 (0)651 201-3448
E-Mail: irpsek@uni-trier.de · Internet: www.irp.uni-trier.de

ISSN 1616-8828

Prof. Dr. Xabier Arzoz LL.M. (Saarbrücken)

Prof. Dr. Xabier Arzoz is Professor of Administrative and EU Law at the University of the Basque Country (UPV/EHU), Faculty of Social and Communication Sciences, Bilbao. Since 2011, he is also Law Clerk at the Spanish Constitutional Court.

Der Beitrag beruht auf dem an der Universität Trier am 17. Dezember 2018 im Rahmen eines Rechtspolitischen Kolloquiums frei gehaltenen Vortrag. Das Kolloquium war Teil der vierteiligen Ringvorlesung „Rechtsstaatsprinzip vs. Demokratie“.

I. Introduction

The Spanish Constitutional Court was created by the Constitution of 1978, which definitively replaced the dictatorial rule of General *Franco*. Said Constitution defines Spain as 'a social and democratic State under the rule of law'. As regards the form of state, Spain constitutes a 'quasi-federal parliamentary monarchy'.[1]

Since its creation and for almost forty years, the Constitutional Court has contributed to the consolidation of democracy, rule of law, and fundamental rights and above all, to the definition and implementation of the so-called 'state of autonomies', which is to say, to the extent and limits of devolution.[2]

This paper aims to critically assess the functioning and independence of the Constitutional Court of Spain, a topic more relevant than ever, not only due to the alarming developments in

---

* I would like to thank colleagues *Ignacio Borrajo Iniesta* and *Miguel Azpitarte Sánchez* for their comments on this paper. The usual disclaimer applies.

1 *Victor Ferreres Comella*, The Constitution of Spain – A Contextual Analysis (Oxford: Hart 2013), p. 48.

2 For an introduction, see *Pedro José González-Trevijano Sánchez*, El Tribunal Constitucional (Cizur Menor: Aranzadi 2000); *Jorge Lozano Miralles and Albino Saccomanno*, El Tribunal Constitucional (Valencia: Tirant lo Blanch 2000); *Sabela Oubiña Barbolla*, El Tribunal Constitucional – Pasado, presente y futuro (Valencia: Tirant lo Blanch 2012); *Juan Luis Requejo Pagés*, 'Das spanische Verfassungsgericht', in *A. von Bogdandy, C. Grabenwarter* and *P. M. Huber* (eds.), Handbuch Ius Publicum Europaeum – Band VI Verfassungsgerichtsbarkeit in Europa: Institutionen (Heidelberg: CF Müller 2016), pp. 639-703; *Xabier Arzoz*, 'Constitutional Court of Spain', in *R. Grote, F. Lachenmann* and *R. Wolfrum* (eds.), Max Planck Encyclopedia of Comparative Constitutional Law (Oxford: Oxford University Press 2018), which can be downloaded at www.mpeccol.com.

some Central European states, but also to the fact that the independence of constitutional jurisdictions everywhere is intrinsically conditioned on their proximity to political organs, as regards selection and activity. The independence of a constitutional court depends on many factors. From a constitutional perspective, an obvious choice is to focus on the status of constitutional judges and their appointment mechanism. Therefore, this paper will forgo exploring other critical issues, such as standing, extension of constitutional review and other organisational questions (law clerks, deciding rules, dissenting opinions, etc.). Nevertheless, the design of Spanish constitutional judicial review strongly resembles that of Germany.

This paper is divided into two parts. The first part reviews constitutional and legal requirements that safeguard the functioning and independence of the Constitutional Court of Spain and looks for deficiencies in the existing framework. In its second part, the paper traces the relevant challenges to the Constitutional Court's independence that have occurred in the past forty years. Major pressure on the Spanish Constitutional Court have come, on the one hand, from political parties and, on the other, in recent times from the Catalonian secessionist movement. Lastly, the paper ends by reaching a conclusion on the matter.

II. Safeguarding functioning and independence

In the constitutional debate, there was no opposition to the idea of creating a constitutional court.[3] Nevertheless, the members of the constituent assembly considered the Constitutional Court a predominantly political body.[4] Although it bears the name and has the functions of a 'court', the Constitutional Court is set apart from the judiciary branch of government. Title VI of the Constitution refers to the judiciary and Title IX to the Constitutional Court. The Constitution of 1978 preserved the centennial Supreme Court, which was explicitly proclaimed Spain's 'highest judiciary body in all branches of justice, except with regard to the provisions concerning constitutional guarantees'.[5] Therefore, the text of the Constitution implies a kind of dual apex (or dual hegemony) instead of a hierarchic relationship; the Supreme Court stands as the highest judicial court, and the Constitutional Court operates as the highest specialized court for constitutional guarantees.

Nevertheless, legal provisions offer a less ambiguous design. First, the organic law of the Constitutional Court defines the Court as the 'supreme interpreter of the Constitution' proclaiming its independence from other constitutional bodies, requiring it to abide only by the Constitution and its organic law, and making it clear that no institution can challenge its jurisdiction or competence.[6] Second, the same organic law assigns the name

---

3 *Pablo Pérez Tremps*, Tribunal Constitucional y poder judicial (Madrid: Centro de Estudios Constitucionales 1985), pp. 97–109.

4 *Francisco Rubio Llorente*, La forma del poder – Estudios sobre la Constitución, 3rd ed. (Madrid: Centro de Estudios Políticos y Constitucionales 2012), p. 1396.

5 Art. 123(2).

6 Art. 1 and 4 of Organic Law no. 2/1979 of the Constitutional Court (several times amended).

to the members of the Court – 'judges of the Constitutional Court' (*magistrados del Tribunal Constitucional*), a denomination equivalent to that of the judges of the Supreme Court and therefore stressing the judicial character of the institution. Third, ordinary courts and judges are not allowed to review nor not apply legislation that is, or may be, unconstitutional – they must appeal to the Constitutional Court –, and fourth, the organic law of the judiciary requires all judges and courts to interpret and apply legal norms in accordance with the Constitution, as well as with the case law of the Constitutional Court.[7] All of these legal provisions assure the supremacy of the Constitutional Court within the legal order. As we will see later, however, it has not avoided conflict with the judiciary in those areas with regard to the enforcement of individual rights, where judges and courts are primarily responsible but the Constitutional Court may review their decisions.

As mentioned in the introduction, the Spanish constitution-maker was inspired greatly by the German model of constitutional jurisdiction.[8] Nevertheless, it imported from Germany only procedures necessary for the *objective* guarantee of the Con-

---

7 Art. 5 (1) of Organic Law no. 6/1985 of the Judiciary (several times amended).

8 See *Pedro Cruz Villalón*, 'Das Grundgesetz im internationalen Wirkungszusammenhang der Verfassungen. Bericht Spanien', in *U. Battis, E. G. Mahrenholz* and *D. Tsatsos* (eds.), Das Grundgesetz im internationalen Wirkungszusammenhang der Verfassungen – 40 Jahre Grundgesetz (Berlin: Duncker & Humblot 1990), pp. 93-108; *Francisco Balaguer Callejón* and *Miguel Azpitarte Sánchez*, 'Das Grundgesetz als ein Modell und sein Einfluss auf die spanische Verfassung von 1978', (2010) Jahrbuch des öffentlichen Rechts 58, 15-39; and *Pedro Cruz Villalón*, 'La Ley Fundamental en la evolución constitucional española (1978-2008)', in *C. Hohmann-Dennhardt, R. Scholz* and *P. Cruz Villalón*, Las Constituciones alemana y española en su aniversario (Madrid: CEPC 2011), pp. 43-60.

stitution and deliberately omitted all procedures for the *subjective* guarantee of the Constitution that are recognised in the German basic law such as the deprivation of individuals' fundamental rights, the prohibition of political parties, and the impeachment of the Federal President and federal judges.[9] This deliberate exercise of 'negative reception' has to do with the negative experience of the predecessor to the Constitutional Court – the Court for Constitutional Guarantees – during the Second Republic (1931-1939) with the trial of Catalonia President Companys.[10] As such, the drafters of the Constitution in 1978 opted for the 'purity' of the Spanish constitutional jurisdiction, exclusively centred on constitutional review of norms and legal acts instead of on individuals and the protection of individual rights.

1. Appointment

The Court is composed of twelve judges, appointed formally by the King for nine-year, non-renewable terms. Four are nominated by the lower house of the Parliament (*Congreso*) by a three-fifths majority of its members, four by the upper house of the Parliament or Senate (*Senado*) with the same majority, two

---

9 Art. 18, 21(1), 61 and 98(2) of the German Basic Law. The differentiation between objective and subjective guarantee of the Constitution comes from *Kelsen*. See *Hans Kelsen*, 'Wesen und Entwicklung der Staatsgerichtsbarkeit', (1929) Veröffentlichungen der Vereinigung Deutscher Staatsrechtlehrer 5, p. 44.

10 On its predecessor, see *Wilhelm Boucsein*, Verfassungssicherung und Verfassungsgerichtsbarkeit in der zweiten spanischen Republik: 1931–1936 (Hanau: Haag-Herchen 1977); *Pedro Cruz Villalón*, La formación del sistema europeo de control de constitucionalidad (1918–1939) (Madrid: CEC 1987), pp. 301-340; and *Manuel Bassols Coma*, La jurisprudencia del Tribunal de Garantías Constitucionales de la II República Española (Madrid: CEC 1987).

by the Government, and two by the General Council of the Judiciary also by a majority of three-fifths.[11] Nominations are divided into thirds, so that a third of judges are replaced every three years. Their appointments and terms do not coincide with the terms of the electing bodies. This form of divided or segmented appointment of the members of the Constitutional Court by the three branches of the government has no exact equivalent in comparative constitutional law.[12] The General Council of the Judiciary has the limited power of governing the organization of the judiciary, but it does not have any jurisdictional power, as that lies exclusively with the judges and courts.

Constitutional judges must be appointed from amongst higher court judges, public prosecutors, university professors, public officials and lawyers, all of whom must be Spanish nationals and jurists of recognized standing with at least fifteen years' experience in professional exercise.[13] The objective qualifications required to be appointed are not particularly strict. This is clear with regard to the broad category of 'public officials', but also the other professions mentioned. For instance, the notion of 'higher court judges' (*magistrados*) includes not only judges of the highest courts of the State as in some other constitutional jurisdictions but also judges sitting at the appellate level or in specialized jurisdictions; additionally, university professors are eligible even if they do not hold a full chair or a law professorship or a professorship at a Spanish university (provided that they

---

11 Art. 127(1)(b) of the Organic Law of the Judiciary.

12 *José Antonio Estrada Marún*, La designación de los magistrados del Tribunal Constitucional en España. Una perspectiva orgánica y empírica (Cizur Menor: Aranzadi-Thomson Reuters 2017), p. 51; *Rafael Naranjo de la Cruz* and *Gaspar González Represa*, 'Artículo 159', in *Yolanda Gómez* (ed.), Estudios sobre la reforma de la Constitución de 1978 en su cuarenta aniversario (Aranzadi: Cizur Menor 2018), p. 404.

13 Art. 159 (2) of the Constitution.

are jurists and Spaniards). Nor are the fifteen years of professional exercise a fine filter. With regard to the subjective requirement of 'recognized standing', candidates to be proposed by the legislative chambers must go through a hearing before the corresponding chamber.[14] However, there is no similar procedure for candidates that are appointed by the Government and the General Council of the Judiciary.

Legislation has not added further limitations or requirements for eligibility; for instance, there is no requirement, as in Germany, for the inclusion in each Court chamber of a certain number of judges from the highest courts of the State,[15] nor a minimum and/or a maximum age to serve as a constitutional judge,[16] nor the requirement to be active in the relevant juridical profession at the moment of the appointment. In practice, however, almost all appointed judges have been either full law professors or judges from the Supreme Court (from any of its five jurisdiction-based chambers, although mostly from its Administrative Law Chamber).[17]

Due to the high number of votes needed, in practice, the two main political parties (since 1982, the Socialist Party and the conservative People's Party) decide on the nominations in the

---

14 Art. 16(2) of the Organic Law of the Constitutional Court, as amended by Organic Law no. 6/2007.

15 Paragraph 2(3) of the Law on the Federal Constitutional Court (BVerfGG).

16 Paragraphs 3(1) and 4(2) of the Law on the Federal Constitutional Court (BVerfGG).

17 To be exact, out of 63 constitutional judges appointed until 2019, 35 have been full professors of law and 25 high judges (23 of them from the Supreme Court). The rest were two practising lawyers (*Fernando García-Mon y González-Regueral* and *Eugenio Gay Montalvo*, which had also been the Chairperson of the Lawyers National Bar Association), and one public prosecutor (*Antonio Narváez Rodríguez*). See *Naranjo de la Cruz* and *González Represa*, cit., p. 408.

legislature and, indirectly, also in the General Council of the Judiciary (which itself is elected by the two branches of the legislature). Therefore, the nomination of two judges by the Government every nine years can shift the majority in the Court ideologically closer to one of the main parties or the other. The election of the two judges by the Government every nine years may have an impact similar to the presidential designation of judges to the US Supreme Court, in the sense that it is the golden opportunity for the executive branch to change or reinforce the ideological profile of the Court, but unlike in the US, government designations does not require approval or ratification by a legislative chamber.[18]

After the nomination by the electing body and before the formal appointment by the King, the Constitutional Court reviews whether each nominee fulfils the constitutional requirements for the position.[19] The Court acts as if that review were just a formality. It limits itself to assessing whether the candidate complies with the formal requirements of legal education and fifteen years of professional exercise, without checking whether he or she has 'recognized standing'.[20] In almost forty years of experience, only one candidate has had difficulties passing said review, although twice.[21]

---

18 On three occasions, socialist governments have enjoyed the so-called 'majority premium' (1986, 1995 and 2004), while centrist and conservative governments only once each (1980 and 2013, respectively).

19 Art. 2(g) and 10(i) of the Organic Law of the Constitutional Court.

20 For the need to assess candidates' extent of legal experience, reasoning skills and expertise in constitutional and European case-law, see *Javier García Roca*, 'La selección de los magistrados constitucionales, su estatuto y la necesaria regeneración de las instituciones', (2012) Revista General de Derecho Constitucional 15, p. 16.

21 *Enrique López López*.

In 2010, the Board of the Senate excluded said candidate in as far as he did not fulfil the requirement of fifteen years of professional practice as a judge, ruling that periods of leave to serve in non-judicial posts could not be considered effective professional practice. Nevertheless, the People's Party again backed his candidacy in June 2013, this time through a direct appointment by the Government. The Constitutional Court stood divided in exactly two halves with regard to whether the nominee complied with the required qualification; finally, the President of the Court cast the deciding vote, and the candidate was formally appointed by the King.[22] This was, obviously, the worst-case scenario. The newly appointed constitutional judge was probably resentful of the situation, and those who had voted against him were probably annoyed by the imposition of their new colleague, this all thanks to the deciding vote of a President who was to leave the institution after that very decision given that his term of office had expired. The lack of prudence by the political party promoting this appointment contributed to the erosion of both the Court's cohesion and its authority.[23]

Procedure and requirements regarding nomination of constitutional judges are one of the recurring topics of constitutional discussion. Since they are constitutionally entrenched, a constitutional reform in accordance with the procedure laid down in Art. 167 is required for its amendment. Criticism on the procedure and requirements of selections dates back to 1980.[24] From

---

22 *Estrada Marún*, *cit.,* pp. 95-96.

23 Nevertheless, the constitutional judge renounced his post a year later, due to a serious traffic infraction. To replace him, the Government appointed as a new constitutional judge a public prosecutor that possessed a thirty-year-long service record. On the whole issue, see *Estrada Marún*, cit., pp. 131-139.

24 The journalist *Bonifacio de la Cuadra* wrote in the daily newspaper *El País* of 26.1.1980 on the fear of a bipartisan appropriation of the Court (then by centrists and social-democrats) and pointed to the lack,

the perspective of guaranteeing the proper functioning and independence of the Court, four deficiencies in this regard can be pointed out:[25]

a) First, the appropriation (or seizure) of the posts of constitutional judges by the two main political parties. This is the principal criticism against the current appointment procedure.[26] Although the quorum for the nomination of constitutional judges in both legislative chambers is high enough to guarantee the broadest consensus on each individual appointment, the partial renovation system usually benefits only the two main political parties. When one of the two main political parties is strong enough (for instance, if it enjoys an absolute or two-thirds majority in the chamber), it tends to impose a 2-1-1 split, according to which it decides on the nomination of two judges, the main oppositional party a third one and the fourth is decided on by mutual agreement. In some exceptional cases, the two main political parties divide the total amount of posts to be appointed in half and allocate them to their partisans; both parties respect the choices of the other and vote together for the whole set. Since the first appointments in 1980 – when politicians were still inspired by the consensus prevailing in the constitutional debate – very rarely has an individual candidate been supported by

---

in the composition of the first Court, of specialists in federal and regional studies. See *Bonifacio de la Cuadra*, Democracia de Papel (Madrid: Catarata 2015), pp. 32-33.

25 For the gender issue in the appointment to the Constitutional Court, which does not affect the functioning or the independence of the Court itself but lies at the different – but not less important – level of parity democracy, see the constitutional amendment proposal by *Octavio Salazar Benítez*, 'La deseable composición paritaria del Tribunal Constitutional: una propuesta de reforma constitucional', (2018) Revista de Derecho Político 101, 741-774.

26 See *Francisco Javier Matia Portilla*, 'La politización de las instituciones: mito y realidad', (2010) El Cronista del Estado Social y Democrático de Derecho 13, 42.

more than the two main political parties.[27] For only three appointments out of 63 has there been a specific agreement between one of the two main political parties and a third political party to appoint a candidate.[28] Several suggestions have been put forward to supress or mitigate this quota system and make legal expertise prevail over political affinity. Generally, these suggestions consist of extending the length of the term of office (either a life term or until retirement) and/or of individual votes in Parliament for each candidate.[29] Comparative law does not, however, offer magical receipts for avoiding the quota system

---

27 The candidacy of *Jorge Rodríguez-Zapata Pérez* received a total of 198 votes and was jointly supported in the Senate by the parliamentary groups of the People's Party, the socialist party, *Entesa Catalana de Progrès*, *CIU* and *Coalición Canaria*. Similarly, some of the judges selected in 2010 by the Senate received the highest number of votes ever obtained in the history of the Senate (*Adela Asua Batarrita*, 226; *Luis I. Ortega Álvarez*, 223; *Francisco Pérez de los Cobos Orihuel*, 221), since they were supported by the People's Party, the Socialist Party, the mixed group and the Basque nationalists. It is one of the rare occasions in which the Basque nationalists have voted in favour of any candidate to the Constitutional Court. This has to do with the fact that the candidacy of *Adela Asua Batarrita* had been proposed by the Parliament of the Basque Country, even if it had been an initiative of the local section of the socialist party within the Parliament. See *Estrada Marún*, cit., pp. 232-234, 261-262.

28 *Carles Viver Pi-Sunyer* (1992-2001), *José Gabaldón López* (in his second term: 1992-2001) and *Encarna Roca Trias* (2012-predictably 2020) were appointed on the basis of agreements between the socialist party and the Catalonian nationalist party CIU; and *Jesús Leguina Villa* (1986-1992) was appointed with the support of both the Socialist Party and the Basque nationalists. See *Estrada Marún*, cit., pp. 181-183, 205, 223, and 225.

29 For a sophisticated amendment proposal, aiming at avoiding both deadlocks and blatant appropriation of posts by the two main political parties, see *Rafael Naranjo de la Cruz*, 'Artículo 159 bis', in *Yolanda Gómez* (ed.), Estudios sobre la reforma de la Constitución de 1978 en su cuarenta aniversario (Cizur Menor: Aranzadi-Thomson Reuters 2018), pp. 413-420.

in the selection of constitutional judges.[30] Constitutional design does weigh heavily, but the issue boils down to one of political culture.

b) Second, the lack of consideration of territorial diversity in appointments to the Constitutional Court.[31] Although conflicts between the central government and the autonomous communities are numerous, and one of the main functions of the Court is precisely to adjudicate in those conflicts, autonomous communities do not participate in the selection of constitutional judges, a task which falls to the four constitutional bodies that represent the three State functions corresponding to the central government (the two chambers of the Parliament, the Government, and the General Council of the Judiciary). Certainly, on the one hand, this may appear coherent with the overall lack of representation of autonomous communities at the 'federal' level in Spain, one of the main differences of Spain's decentralization model from some other federal systems, and with the 'non-federal' character of the Constitutional Court of Spain, but, on the other hand, it seems inadequate for the State to turn its back on regional sensitivity and expertise if the Constitutional Court wishes to strengthen its authority. By contrast, the Spanish Constitution of 1931 explicitly laid forth that each autonomous region could nominate a judge, even if only Catalonia benefited from this possibility as it was the only autonomous region prior to the civil war, and in the end, the experience has been

---

30 *Pablo José Castillo Ortiz*, 'Guardar al Defensor de la Constitución' – Sobre la independencia de la jurisdicción constitucional: evaluación de alternativas institucionales (Madrid: Fundación Alternativas 2012), p. 30.

31 *Jerónimo Arozamena Sierra*, 'Organización y funcionamiento del Tribunal Constitucional: balance de quince años', in La jurisdicción constitucional en España – La Ley Orgánica del Tribunal Constitucional: 1979-1994 (Madrid: Tribunal Constitucional-Centro de Estudios Constitucionales 1995), p. 46.

deemed as negative, as the judge appointed by Catalonia acted more as a representative of the region than as a member of a court.

In 2007, the procedure to nominee constitutional judges within the Senate was amended.[32] Now, the Senate nominates its four judges from candidates proposed by the legislatures of the seventeen autonomous communities; each regional assembly proposes two candidates, and each candidate must go through a public hearing in the Senate.

The impact of this innovation, which has only been put in practice twice (in 2010 and 2017), has been quite modest, and its future is uncertain. On the one hand, the selecting body, the Senate, does not represent the autonomous communities, since most of the senators are directly elected by the people on a province-district basis and only around one fifth are appointed by regional Parliaments. On the other hand, one of the two main State-wide political parties – the People's Party – disagreed with the reform of the selection process, challenging the amendment before the Constitutional Court, which declared the reform to be compatible with the Constitution, provided that it is understood that the Senate is not bound by the proposals of the regional Parliaments if it considers that their candidates are not appropriate.[33] This interpretation saved the constitutionality of

---

32 The amendment consisting of not more than a handful of words was not carefully elaborated. In fact, the Government's original proposal to amend the Organic Law of the Constitutional Court did not include it, but the Basque and Catalonian nationalist party groups (CIU, PNV and ERC) submitted to the Parliament propositions to guarantee that the Senate appoint candidates that would be sensitive to autonomous communities' rights.

33 Judgments 49/2008 and 101/2008. On these rulings, see *Ignacio Torres Muro*, 'La reforma de la LOTC y del Reglamento del Senado, puesta a prueba', (2008) Revista General de Derecho Constitucional 6; *Juan Francisco de Asis Sánchez Barrilao*, 'La participación de

the amendment but downgraded the participation of autonomous communities in the procedure to nominate constitutional judges to a mere right to be consulted.[34] Moreover, the People's Party made regional assemblies, where it had strong representation, nominate the same two people to the Senate, disregarding the spirit of the reform. This was possible as the regionalization of the party system is still embryonic outside the more assertive of the autonomous communities. Regional politicians owe their position to the national party that appoints and supports them in the first place, and they are, therefore, subservient to the party's needs and less able to promote and defend distinctive candidates to national institutions. In 2017, when the amended selection procedure was implemented for the second time, the socialist party also partially joined the People's Party in its consolidation of candidates proposed by the regional assemblies. Consequentially, the Parliaments of Catalonia and the Basque Country refrained from proposing candidates to the Senate, as they considered that the leadership of the two main State-wide political parties had already decided on the selection of the four judges, even before they were heard in the Senate. Thus, they expressed their disagreement with the way the amendment to the selection process had been implemented.

It is not a question of territorial representation, but of sensitivity to and expertise in the promotion of autonomy – and therefore,

---

las Comunidades Autónomas en la elección de los magistrados constitucionales', (2009) Teoría y Realidad Constitucional 23, pp. 387-424; *Patricia Rodríguez-Patrón*, 'El Tribunal Constitucional ante la reciente reforma de los artículos 16 de su Ley Orgánica y 184 del Reglamento del Senado', (2010) Revista de Derecho Político 77, pp. 107-140; and *Joaquín Uría*s, 'El Tribunal Constitucional ante la participación autonómica en el nombramiento de sus miembros', (2010) Revista d'Estudis Autonòmics i Federals 10, pp. 207-244. In favour of the Court's understanding, *Lozano Miralles* and *Saccomanno*, *cit.*, pp. 294-296.

34 For a thorough commentary, see *Estrada Marún*, cit., pp. 281-290.

of increasing the legitimacy of the 'arbiter' in territorial disputes. As a result of the design and implementation of the reform, only one of the four constitutional judges selected in 2010 by the Senate may be considered an expert in decentralisation, and only one other had her residence outside Madrid. Furthermore, in 2017, only one was an expert on federalism or autonomy, while three others had their residence in Madrid. More disturbing still was the circumvention of the legal procedure for nomination in 2010 with no consequences to speak of, despite its implementation in accordance with the interpretation handed down by the Constitutional Court. One of the judges elected by the Senate had not been originally proposed by legislature of an autonomous community;[35] the reason for his election was not that the Board of the Senate had considered, pursuant to Judgment 49/2008, that regional assemblies had not provided it with candidates qualified enough for the post but instead because the Senate had rejected the 'first' option presented by one of the two main political parties, and thus the leadership of that political party had decided to replace the regional candidate with a new one.

c) Third, the increasing role of career judges in the Constitutional Court.[36] From the beginning, career judges have always been appointed to the Constitutional Court. Although it is not required to do so, the General Council of the Judiciary has always taken care to propose career judges to the Court. In the first Court, there were nine professors and three career judges. In 2002, after a premature replacement, the number of career judges rose to five. After the partial renovation of 2004, the Court was made up of seven career judges, one lawyer, and

---

35 *Francisco Pérez de los Cobos Orihuel*.

36 In Spain, judges are generally recruited as a special kind of civil servant to serve in the judiciary through a competitive public exam and after completing legal training.

four professors. This was the longest Court, since two thirds of its composition were renovated much later than normal. Today, after the partial renovation of 2017, a similar proportion prevails: six career judges (former judges of the Supreme Court, four of them from the same administrative law chamber), a career public prosecutor (a chief prosecutor at the Supreme Court), and five professors.

It is not only the number, but also the relevance of career judges which has increased. For decades, all the presidents of the Court came originally from academia, even if professors were not in the majority. This was not based on any legal provision, but on tradition. The pattern changed in 2011, when a career judge – a former President of the Supreme Court – was elected by the constitutional judges as their President; the same occurred in 2017 when, for the second time, another former judge of the Supreme Court was elected to become the President of the Constitutional Court.

Both trends, the prevailing number of career judges and the presidency in the hands of a career judge, reinforce each other. They refer to a situation in which the Constitutional Court has surreptitiously 'been captured' by the more conservative Supreme Court. In 2011, the Court included two former Presidents of the Supreme Court; quite symbolically, until 2008 one of them was known for his disagreement with and criticism of the Constitutional Court.[37] Currently, the President and the Vice-President of the Court – which are, also, the Presidents of both Chambers of the Court – are career judges and hold the right to cast the deciding vote when there is a tie in plenary sessions and in chambers.

---

[37] *Francisco José Hernando Santiago*, President of the Supreme Court (2001-2008) and judge of the Constitutional Court (2011-2013).

This development has had implications on the nature and scope of the Court's review. First, constitutional judicial review may be conceived as a continuation of the judicial review in which career judges are trained and, therefore, pieces of legislation challenged before the Court may be treated as administrative acts or rules. Second, many individual applications for the protection of fundamental rights challenge judicial decisions taken by the different Chambers of the Supreme Court, and former members of the Supreme Court may be deferent to the decisions of their colleagues still sitting on the bench.

This development is possible because in Spain, unlike in Germany or Italy, there is no limitation on the number of career judges sitting on the Constitutional Court, and because, unlike in Germany, the election of the President of the Court is a decision devolved to its own judges.

d) Fourth, the lack of an age limitation for appointment to the Constitutional Court.[38] Due to the lack of specific rules, it is up to the judges themselves to decide whether they are fully able to complete a full term. In the past, most of the premature ends to terms have been for age or health reasons. Nevertheless, in recent years the average age of constitutional judges when appointed has increased, and it is no exception that judges near or even over the age of 70 are appointed. This is fostered by the erroneous idea that appointment to the Constitutional Court is an honorific corollary for a distinguished legal career. In 2017, a record of sorts was broken in this regard; a 79-year-old law professor was appointed for a term of nine years. In Spain, judges of the Supreme Court must retire at the age of 72 and other judges as well as university professors at the age of 70.

---

[38] Originally, this was a deliberate decision in order not to prevent the appointment of *Manuel García Pelayo* (1909-1991) to the Court. He was appointed in February 1980 at the age of seventy.

However, they are still eligible to be constitutional judges even if they are retired from the professional exercise that justifies their eligibility.[39] The lack of age rules for the appointment or the retirement of constitutional judges is detrimental to the proper functioning of the Court, whose workload is extremely demanding.

Moreover, since there is neither an age limitation nor any limitation on the number of career judges, the political party sustaining the Government can use appointment to the Constitutional Court to reward those judges of the Supreme Court – especially those serving as Presidents of the Supreme Court or of one of its Chambers – that prove deferent to government initiatives or judicial difficulties. The Supreme Court reviews the legal acts of the Government and the General Council of the Judiciary (through its Administrative Law Chamber), it adjudicates on suits to prohibit political parties at the behest of the Government or the public prosecutor (through the so-called Special Chamber) and tries individuals with parliamentary immunity (through its Criminal Law Chamber).[40] To avoid both dangers for the

---

39 For instance, *Francisco José Hernando Santiago* had already retired from the Supreme Court in 2008 at the age of 72 when in 2010 at the age of 74 he was appointed to the Constitutional Court; similarly, *Santiago Martínez-Vares García* had already retired from the Supreme Court in 2012 at the age of 72 when, a year later, he was appointed to the Constitutional Court. Professor *Fernando Garrido Falla* (1921-2002) was appointed in February 1998 at the age of 76.

40 Several former Presidents of the Supreme Court have been appointed to the Constitutional Court (*Ángel Escudero del Corral, Jesús Delgado Barrio, Francisco José Hernando* and *Pascual Sala Sánchez*), which represent four of the nine Presidents of the Supreme Court of the democracy. In most cases the appointments were decided formally within the General Council of the Judiciary (except in the case of *Jesús Delgado Barrio*). Certainly, the appointment to the Presidency of the Supreme Court also requires the agreement of the two main political parties within the General Council of the Judiciary. Neverthe-

functioning and the independence of both the Constitutional Court and the Supreme Court, age rules either for appointment or for the retirement of constitutional judges should be adopted. The establishment of a fixed retirement age for constitutional judges would not be more of a disturbance to the partial renovation cycle than the succession of unpredicted individual vacancies that inevitably, by virtue of death or premature resignations, already occur.[41]

By contrast, election by the Government shows a consistent pattern of tactical acumen; the average age of constitutional judges elected by the Government is 52.[42] As previously mentioned, by electing two constitutional judges every nine years, the Government has the prerogative to orient or reinforce the majority of the Court in the ideological direction of its choosing. From the existing data, it would seem that, to fully exploit this advantage, successive Governments have considered the age of candidates and have opted for middle-aged judges to guar-

---

less, it would look more impartial and less confusing if the same individuals were not promoted to the top of the Supreme Court and later to the Constitutional Court. This is connected with the arguments above mentioned to avoid transforming the Constitutional Court in an extension of the Supreme Court.

41 The following judges did not complete their terms: *Menéndez y Menéndez* (1980, resignation), *Fernández Viagas* (1982, death), *Díez de Velasco* (1985, resignation), *García-Pelayo* (1986, resignation), *Truyol y Serra* (1990, resignation), *De los Mozos* (1992, resignation), *Delgado Barrio* (1996, resignation), *Ruiz Vadillo* (1998, death), *Garrido Falla* (2002, resignation), García-Calvo (2008, death), *Hernando Santiago* (2013, death), *López López* (2014, resignation), and *Ortega Álvarez* (2015, death).

42 All male and mostly professors: 1980, *Arozamena*, 56 and *Gómez-Ferrer*, 43; 1986, *Rodríguez-Piñero*, 51 and *López Guerra*, 39; 1995, *Jiménez de Parga*, 66 and *Vives Antón*, 55; 2004, *Aragón Reyes*, 60 and *Pérez Tremps*, 47; 2013, *González-Trevijano*, 55 and *López López*, 50; 2014, *Narváez Rodríguez*, 56.

antee that their election will not be reversed through a premature end of term, and thereby, a vacancy that might be filled by a Government of another ideology. In fact, none of the Government's eleven appointments in almost forty years has prematurely ended his term due to death, age or health reasons.[43]

2. The peculiar shortening and extension of the constitutional nine-year-term of office

Further clarification is needed with regard to the time factor in appointments to the Constitutional Court. The Constitution clearly establishes that constitutional judges are appointed for nine-year, non-renewable terms, although special provisions were applied to the terms of the twelve judges appointed in 1980.[44] Nevertheless, the organic law of the Constitutional Court allows for a second full-term appointment if three years have elapsed after the expiration of the first appointment to the Court; in other words, the law forbids consecutive, but not discontinuous appointments.[45] If judges could be reappointed for a new consecutive full term of nine years, their independence may appear compromised; they could be inclined to seek reappointment, and even if not, their opinions could still be understood in this light. Therefore, the law only allows for discontinuous appointment. In almost forty years, this possibility has never been exercised. Therefore, no serious discussion on the legitimacy and opportunity of this rule has ever occurred.[46]

---

43 The only case of a premature end of the term of office was a resignation due to a traffic incident.

44 Ninth transitory provision to the Spanish Constitution.

45 Art. 16(4) of the Organic Law of the Constitutional Court.

46 *Eduardo Espín Templado*, 'Art. 16', in *J. L. Requejo Pagés* (ed.), Comentarios a la Ley Orgánica del Tribunal Constitucional (Madrid 2011), p. 300.

However, strong criticism has been levelled with regard to the way in which the nine-year term may be shortened or extended in given circumstances:

a) When there is a vacancy at the Court for reasons others than the expiration of term of office (death, resignation, incapacitation, incompatibility etc.), the relevant selecting body shall propose to the King the appointment of a new judge to serve for the remaining time, that is, until the full set of four judges is renewed in due time. The new judge will always serve for a period of time inferior to nine years. Nevertheless, if a judge appointed to replace a judge that has died or resigned serves for less than three years, the Organic Law of the Constitutional Court allows the selecting body to propose the same judge for a new full term of nine years.[47] These are the only situations in which a constitutional judge may be appointed either for a period of less than nine years or for two consecutive periods amounting to almost twelve years. Both situations could be seen to be at odds with the nine-year term of office that the Constitution foresees.[48] Nevertheless, as a premature end to the term of constitutional judges may happen, the legislator had to give priority either to

---

47 Art. 16(4) of the Organic Law of the Constitutional Court. In all cases in which a constitutional judge had been initially appointed for a period of time inferior to three years, he was later appointed for a new full term of nine years (*García-Mon*, 1989; *Gabaldón*, 1992; *Enríquez Sancho*, 2017; in all cases but one, by the same electing body. *Pera Verdaguer* was appointed to the Constitutional Court on 15 January 1983; the partial renovation vote in the General Council of the Judiciary took place on 29 January 1986 when he had already exceeded the three years. For a thorough study of the rationality and practical implementation, not without difficulties, of the partial renovation system see *I. Borrajo Iniesta*, 'Renovarse o morir: el ritmo de las renovaciones del Tribunal Constitucional español', (2013) Revista General de Derecho Constitucional 16.

48 *Francisco Rubio Llorente*, La forma del poder (Madrid 2012), vol. II, pp. 1398-1399; *Estrada Marún*, cit., p. 74.

the strict application of the nine-year term of office or to the partial renovation system, both of which being constitutionally entrenched. A systematic interpretation of the Constitution supports the legislator's decision to give priority to the partial renovation system within the described terms.[49]

b) Confrontation between the two main political parties led to a serious case of political deadlock in the appointment of constitutional judges. From February 2007 to July 2012, many of the constitutional judges continued to serve on the Court though their term had expired. For a number of weeks (from the 8 November 2010 to the end of January 2011), only a third of the judges' terms had not expired. Thus, the partial renovation cycle of the Court was very much affected. In two steps, the legislator amended the law in an attempt to avoid part of the incentives for, and part of the consequences of, a deadlock. According to provisions established in 2007, the Presidency and Vice-Presidency of the Court expire after three years, but in cases where the necessary partial renovation fails, they continue on until the renovation of four judges takes place and the new judges are sworn into office.[50] The Court declared that this amendment was consistent with the Constitution.[51] According to provisions established in 2010, the ordinary nine-year term of constitutional judges replacing those with an expired term of office shall be shortened to match the delay in the renovation incurred by the selecting body.[52] As a consequence, constitutional judges appointed in 2011 were replaced in 2017 after having served only six years. Thus, the judges appointed in 2012 should be

---

49 In this sense, *Espín Templado*, cit., p. 301-302.

50 Art. 16(3) of the Organic Law of the Constitutional Court, as amended by Organic Law no. 6/2007.

51 Judgments 49/2008 and 101/2008.

52 Art. 16(5) of the Organic Law of the Constitutional Court, as amended by Organic Law no. 8/2010.

replaced in 2020 after having served approximately seven and a half years. These practices do not seem consistent with Art. 159(3) of the Constitution, which explicitly foresees a nine-year term of office.[53]

In both situations, the legislator's sole concern seems to be the preservation of the partial renovation cycle every three years, as though it were the only constitutional key to the proper functioning of the Court – which it is not nor should it be but instrumental – at the risk of downplaying the importance of the constitutional provision which clearly stipulates nine-year terms. Instead of remedying the causes or the consequences of political deadlock, the new provisions have paradoxically legalised non-compliance with the legislative chambers' constitutional duty to provide renovation of the Court in due time and have shifted the consequences of political deadlock to the length of term of office of constitutional judges. Legal scholarship has proposed several solutions to bypass political deadlocks after a reasonable delay has elapsed: lowering the majority required for election, co-option of constitutional judges, the King's right to propose candidates to the selecting bodies, appointment by or of constitutional judges emeriti, appointment by other social organisations, etc.[54]

---

53 The amendment has been the object of sharp criticism: see, for instance, *Luis Pomed Sánchez*, 'Prólogo' to *J. A. Estrada Marún*, La designación de los magistrados del Tribunal Constitucional en España. Una perspectiva orgánica y empírica (Cizur Menor: Aranzadi-Thomson Reuters 2017), p. 37: 'Organic Law no. 8/2010 does not correspond with a democracy that is almost four decades old'. An elaborated criticism in *Estrada Marún*, cit., pp. 259, 339-343.

54 Reform proposals are numerous. Among them, see *Susana García Couso*, 'Cómo superar la lógica del estado de partidos en el Tribunal Constitucional: la reforma del artículo 159', (2012) Teoría y Realidad Constitucional 29, 433-456; *Germán Fernández Farreres*, 'Sobre la designación de los magistrados constitucionales: una propuesta de

3. Status of independence

Constitutional provisions explicitly protect the independence of members of the Constitutional Court; membership of the Constitutional Court is incompatible with any representative function, any political or administrative office, a management role in a political party or trade union or any employment in their service, a career as a judge or prosecutor, and any professional or commercial activity whatsoever; the incompatibilities related to the members of the Judiciary are also applicable to the members of the Constitutional Court, and judges of the Constitutional Court are independent and irremovable during their term of office.[55] It is the Court itself who declares the end of term of constitutional judges.[56] In almost forty years of operation, the members of the Court have not had any problems with these provisions.

Beyond the entrenched incompatibilities, selecting bodies tend to avoid appointing to the Constitutional Court individuals that have in the past had relevant political, governmental or ministerial responsibilities. For instance, out of 63 constitutional judges appointed up until 2019 none had previously been a member of the State or a regional government in the constitutional period,[57]

---

reforma constitucional' (2015) Revista Española de Derecho Constitucional 105, 13-49; *Estrada Marún*, cit., pp. 352-370.

55 Art. 159 (4) and (5) of the Constitution.

56 Art. 23 of the Organic Law of the Constitutional Court.

57 The exceptions are, in any case, quite distant in the past: first, *Plácido Fernández Viagas*, appointed as a constitutional judge in 1980 by the General Council of the Judiciary, had been the Chairman of the political-representative body preparing the autonomous community of Andalucía (1978-1979) before joining the General Council; second, *Aurelio Menéndez*, appointed as a constitutional judge in 1980 and at the same time as the preferred candidate of the governing party to be the President of the Court, had been Minister of Education between 1976-

and only a handful had been members of the State Parliament, mostly only senators during the drafting of the Constitution.[58]

Controversy arose in July 2013 when, immediately after the election of a new President of the Court,[59] it was revealed that he had been member of a political party until shortly prior to his election, including during the previous three years of service at the Court; said controversy should be understood in that the general public strongly believes that membership to a political party is incompatible with the status of a constitutional judge. However, as previously indicated, the Constitution does not forbid ordinary membership, only a management role in a political party. Therefore, a formal request to the Court to exclude the participation of its President from proceedings concerning Catalonia was rejected on September 2013, with widespread incomprehension from the general public.[60] Some scholars propose to amend Article 159 of the Constitution to exclude even the membership to any political party or trade union by constitutional judges.[61]

1977 – he immediately resigned, however, from the constitutional office as his colleagues opted to elect another judge as their President –; and third, *Manuel Jiménez de Parga*, appointed as a constitutional judge in 1995, had been Minister of Labour between 1977-1978.

58 Only the law professor *Andrés Ollero Tassara*, appointed in 2012 to the Constitutional Court, had been before a member of the Parliament for seventeen years (1986-2003).

59 *Francisco Pérez de los Cobos Orihuel*.

60 Order 180/2013. See *Francisco Javier Matia Portilla*, 'Sobre la adscripción partidaria de los magistrados del Tribunal Constitucional y su invocación en el proceso', (2014) Teoría y Realidad Constitucional 34, pp. 235-268.

61 *Naranjo de la Cruz* and *González Represa*, cit., pp. 411-412.

Other measures to guarantee the independence of the Court include: immunity of constitutional judges for opinions expressed in the exercise of their functions,[62] criminal protection against defamation, libel or threats by third persons,[63] the fact that the Supreme Court is the legal venue to try constitutional judges,[64] the power to approve and manage the Court's budget,[65] and the power to pass rules on its own functioning and organisation and on the statute of its staff.[66]

---

62 Art. 22 of the Organic Law of the Constitutional Court. See *Clara Viana Ballester*, 'La no reforma de la inviolabilidad de los Magistrados del Tribunal Constitucional mediante LO 6/2007', in Constitución, derechos fundamentales y sistema penal (Semblanzas y estudios con motivo del setenta aniversario del profesor Tomás Salvador Vives Antón), t. II (Valencia: Tirant lo Blanch 2009), pp. 1973-1987.

63 Art. 504 of the Criminal Code.

64 Art. 57(2) of the Organic Law of the Judiciary.

65 Second Additional Provision of the Organic Law on the Constitutional Court. See *Lozano Miralles* and *Saccomanno*, cit., pp. 216-220.

66 Art. 2 (2) of the Organic law on the Constitutional Court.

III. Challenges to the functioning and independence of the Constitutional Court

Three kinds of challenges to the proper functioning and independence of the Constitutional Court can be discerned in its forty-year existence: pressure from the three branches of government, from political parties, and from territorial powers. Each of these challenges is of different intensity and impact. The next few sections will analyse them from the least to the most serious interferences.

1. Challenges from three branches of government

Tension between the Court and State powers is to some extent inevitable. Understandably, a public authority whose act is annulled tends to dislike the judgment handed down by the Court. This is especially the case when the Spanish Government sees one of its emblematic legislative initiatives annulled. For instance, Judgment 341/1993 declared unconstitutional the law which gave power to the police to enter a place of residence without a warrant when a crime is believed to be being perpetrated. The Minister that proposed the legislation resigned immediately following this decision.

On occasion, the Court has adopted a moralizing tone, reminding public powers that they owe loyalty to the Constitution and affirming the need to correct anomalous situations in which the central state continues exercising powers that belong to the autonomous communities.[67]

---

67 See, for instance, Judgments 208/1999 and 95/2016.

Nevertheless, neither the central government nor the legislature has ever reacted with unconstitutional measures or with attempts to weaken the Court or its powers. There has never been a case of the re-passing of legal provisions already ruled unconstitutional and void by the Court. The Court can generally count on a responsive legislature, which, when asked to amend or replace unconstitutional legislation, responds within a reasonable time.[68] Last but not least, the constitutional amendment has never been used as a way of side-stepping a Court ruling, as in other European countries.[69]

---

68 In 1999, the Court held unconstitutional the centralisation of administrative powers for the protection of competition and called on the legislature to regulate the decentralisation and co-ordination of administrative powers in this area (Judgment 208/1999); in 2002, the legislature passed an act establishing said principles. In 2012, the Court held unconstitutional the centralisation of powers concerning the management of railroads and called on the legislature to specify which railroads are of the national interest and should remain with the central state's competence and which should not and should be transferred to the autonomous communities (Judgment 245/2012). Formal compliance with the judgment was endorsed first by the government, which urgently passed a provisional scheme in just two months, and, later, by the legislature with a definitive scheme in 2013. Nevertheless, new controversies arose with regard to the decisions made by the central state.

69 For instance, Art. 53(1) of the French Constitution was amended to bypass *décision* 93-325 of 13 August 1993 of the *Conseil Constitutionnel*, on the Aliens Act limiting aliens' rights. Constitutional amendments to overcome, or even to prevent nullifying judgments of the Constitutional Court, are not rare in Austria: *Heinz Schäffer*, 'La relación entre el Tribunal Constitucional y el legislador', in *E. Aja* (ed.), Las tensiones entre el Tribunal Constitucional y el legislador en la Europa actual (Barcelona: Ariel 1998), 40-42.

By contrast, clashes with the Supreme Court have been relatively frequent in the first twenty-five years (1981-2007), especially with its Civil and Criminal Law Chambers.[70] The Supreme Court's Criminal Law Chamber explicitly rejected rulings by the Constitutional Court concerning the interpretation of time limitations for criminal responsibility,[71] since the former considered that the latter had invaded its competence on the interpretation of legality. For that same reason, the Supreme Court's Civil Law Chamber became irritated by the Constitutional Court's rulings on cases dealing with the investigation of paternity[72] and on a celebrity's honour.[73] Conflict with the Supreme Court reached a head when in January 2004 it declared a civil suit against each

---

70 *Rosario Serra Cristóbal*, La guerra de las cortes: la revisión de la jurisprudencia del Tribunal Supremo a través del recurso de amparo (Madrid: Tecnos 1999); *Pedro Cruz Villalón*, 'Conflict between Tribunal Constitucional and Tribunal Supremo – a national experience', in The future of European judicial system in a comparative perspective (Baden-Baden: Nomos 2006), 111-116; *Leslie Turano*, 'Spain: Quis custodiet ipsos custodes?: The Struggle for Jurisdiction Between the Tribunal Constitutional and the Tribunal Supremo', (2006) 1 International Journal for Constitutional Law 1, pp. 151-162; *Luis E. Delgado del Rincón*, 'El principio de primacía del Tribunal Constitucional en materia de garantías constitucionales: su cuestionamiento por la Sala Primera del Tribunal Supremo', en *P. Pérez Tremps* (ed.), La reforma del Tribunal Constitucional – Actas del V Congreso de la Asociación de Constitucionalistas de España (Valencia: Tirant lo Blanc 2007), pp. 633-670; *Cornelia Hansen,* 'Guerra de Cortes': der Konflikt zwischen dem Spanischen Verfassungsgericht und dem Spanischen Obersten Gericht (Hamburgo: Dr. Kovac 2008); *Rafael Mendizabal Allende*, La guerra de los jueces: Tribunal Supremo vs. Tribunal Constitucional (Madrid: Dykinson 2012).

71 See, for instance, Judgments 63/2005, 138/2016, and 22/2017.

72 Judgment 7/1994. The judges of the Civil Chamber of the Supreme Court even considered the possibility of submitting a protest to the King. See *Bonifacio de la Cuadra*, Democracia de papel (Madrid: Catarata 2015), p. 33.

73 Judgments 115/2000 and 186/2001.

of the twelve constitutional judges for professional negligence. The Supreme Court considered that the Constitutional Court had not reasoned its decision to not admit an extravagant individual complaint based on the merits of the case; the complaint was directed 'to the Constitutional Court replaced by a composition that would guarantee an impartial assessment,' and it requested the recusal of all of the constitutional judges and the elaboration by the Parliament of a new law providing a new Constitutional Court. The constitutional judges were obliged to compensate for damages. Instead of worsening the conflict, they paid the compensation and submitted individual constitutional complaints against the Judgment before the Constitutional Court. The case remained undecided until, more than nine years after the submission of their constitutional complaint, a fully-renewed Constitutional Court could address it. In Judgment 133/2013, the Constitutional Court stated that no Spanish court could review its rulings and annulled the Supreme Court's ruling imposing compensation for damages. In light of the Supreme Court ruling against the constitutional judges, Art. 4 of the Organic Law of the Constitutional Court was amended in 2007 to make clear that no court of the State may review decisions of the Constitutional Court and that the Court may take all necessary measures to preserve its jurisdiction, including *ex officio* declaration of the nullity of acts or decisions that undermine it.

2. Challenges from political parties

The Constitutional Court's first years of functioning were, for some, a sort of golden age in terms of independence; 'the first constitutional judges were the most independent and capable

in the history of the institution.'[74] Two examples of this golden age must be mentioned. First, in 1980 the judges did not elect as their President the candidate already 'decided' by the two main political parties, the commercial law professor *Aurelio Menéndez* who had been Minister of Education during the transition to democracy, but, symbolically, the seventy-year-old constitutional law professor *Manuel García-Pelayo* who had defended the Republic as a young officer and had later taught constitutional law in Puerto Rico and Venezuela.[75] Second, in 1982 the two then-main political parties agreed to enact a harmonising law according to Article 150(3) of the Constitution to regulate the process of decentralisation. Simply put, they attempted to impose a uniform model for the developing system of devolution of powers. Suits against the law were brought by the Basque Country and Catalonia. In a hard-hitting ruling, the Constitutional Court unanimously declared that preventive harmonization of the rule-making provisions of the newly born or to-be-created autonomous communities was not compatible with the Constitution.[76]

Nevertheless, even capable judges must cope with challenges to their independence. The first challenge to the Court's independence happened at the very beginning; by virtue of transitory provisions of the Constitution, four of the judges of the Constitutional Court had to be replaced in 1983, in order to establish the partial renovation cycle every three years; nevertheless, they could be exceptionally re-appointed for another full term. Those four judges had been part of the broad consensus between centrists (the then-governing party) and socialists (the

---

74 *Bonifacio de la Cuadra*, Democracia de papel (Madrid: Catarata 2015), p. 32. He insists that, at that time, the Court was not yet mortgaged by political parties, but by the Constitution it had to interpret.

75 *Estrada Marún*, cit., p. 57.

76 Judgment 76/1983.

then-main opposition party) to elect the first ten judges by both the Parliament and the Government in 1980. In fact, after winning the 1982 general election with an absolute majority (202 seats out of 350) the governing socialist party made it clear that it only wished to re-appoint two of them, apparently, because the other two were politically less trust-worthy.[77] By contrast, the opposition conservative party preferred to either maintain all of them or to appoint four new judges. For seven months, political forces discussed whether to re-appoint the judges or not. Here, the idea that the composition of the Court should reflect the political composition of the Parliament emerged for the first time. In the meanwhile, the Court continued business as usual and, for instance, unanimously ruled on the preventive harmonisation of the autonomy process. In the end, the four judges whose term of office had expired were re-elected, a decision which reinforced the authority of the Court.[78] If in those inaugural years these judges had been chastened for their legal opinions, the political message would have been devastating. Pressure on judges by political parties in politically disputed cases, however, has not been entirely averted in those years, as demonstrated the review of a Government's controversial expropriation of a firm[79] or, years later, the review of abortion legislation.[80] Both cases were decided with the President of the Court casting the deciding vote.[81]

---

77 Professors *Francisco Rubio Llorente* and *Antonio Truyol y Serra*.

78 See *Estrada Marún*, cit., pp. 169-173.

79 Judgment 111/1983. The Plenary of the ECtHR declared in Ruiz-Mateos v. Spain (Judgment of 23 June 1993, application no. 12952/87) that there had been a violation of Art. 6(1) CEDH "as regards the fairness of the proceedings conducted in this case in the Constitutional Court".

80 Judgment 53/1985.

81 This brought about rough media campaigns against the then President, *Manuel García-Pelayo*, which went on even after his premature

Spanish constitutional jurisdiction shows a degree of politicisation similar to that of other constitutional jurisdictions, since complete independence from politics cannot, by definition, be fully achieved. First, all constitutional judges are selected by political institutions, which are controlled by the main political forces of the time, political affinity being a relevant aspect of their selection. Legislative chambers are no longer the fora to discuss the subjective requirements and skills of the candidates. Few people outside the selecting body carry negotiations on the appointments to the Constitutional Court, and sometimes, as it happened in 2001, it is part and parcel of broader political bargaining between the two main political forces that includes other constitutional institutions. Second, constitutional judges presently make up two clusters, socialist or conservative, in the sense that they concur more often with judges of the same cluster than those of the other. Third, internal tension within a Constitutional Court and public controversy with regard to judgments with political implications are inevitable. Peaks of tension and controversy are sometimes reached in constitutional jurisdictions. Nevertheless, an empirical study on constitutional judicial review voting in the Spanish Constitutional Court for a period of twenty years (1980-2001) concludes that 'party alignment exists but is subject to complex incentives and institutional influences', and that ideology is 'subject to institutional restrictions that favour frequent unanimous decisions'.[82]

All the same, there is a perception that the degree of politicisation of the Spanish Constitutional Court has deteriorated in the

---

resignation in 1986. See *Rubio Llorente*, La forma del poder (Madrid 2012), vol. I, p. 432.

82 *Nuno Garoupa, Fernando Gómez-Pomar* and *Veronica Grembi*, 'Judging under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court', Illinois Law, Behavior and Social Science Research Paper Series, Nr. LBSS11-22 (University of Illinois, College of Law), May 2011, p. 17.

last decade,[83] with a majority of scholars pointing to the constitutional adjudication on Catalonia's autonomy statute of 2006 as the turning point.[84] Strictly speaking, the phenomenon is not about the party preferences of constitutional judges, but about the instrumentalisation of constitutional jurisdiction by the main political parties.[85] There is no easy solution to brutal instrumentalisation.

Two basic events have made the appearance of politicisation more visible to citizens: the stormy proceedings of the constitutional appeal against the statute of autonomy of Catalonia (2006-2010) and the three-year political deadlock to renew the Constitutional Court (2007-2010). When the polarisation of political life reaches a climax, as occurred in those cases, the functioning of the Constitutional Court is one of the collateral victims. The struggle over appointments and the crossover recusal of constitutional judges at the behest of the two main political parties made the Constitutional Court internally more fragile and externally more vulnerable to accusations of political bias.

Between 2006 and 2010, the atmosphere both inside and outside the Court was tense. To understand the intensity of the political confrontation, it must be, first, noted that the governing conservative People's Party had just unexpectedly lost the gen-

---

83 *Castillo Ortiz*, cit., p. 14.

84 In this sense, *Octavio Salazar Benítez*, 'El nombramiento de los magistrados y las magistradas del Tribunal Constitucional: ingeniería jurídica vs cultura política", in *Alejandro Villanueva Turnes* (ed.), El Tribunal Constitucional español (Tébar Flores 2017), p. 28; *J.-B. Harguindéguy, G. Sola Rodríguez* and *J. Cruz Díaz*, 'Between justice and politics: the role of the Spanish Constitutional Court in the state of autonomies', (2018) Territory, Politics, Governance, p. 10: 'The politicization of the court with respect to the ruling about the statute of Catalonia damaged the reputation for impartiality of the court'.

85 *Harguindéguy, Sola Rodríguez* and *Cruz Díaz*, cit., p. 15.

eral elections of 14 March 2004, after having run the Government for the previous eight years. A few days prior to said elections a terrorist attack on a Madrid railway killed near two hundred people. The central government insisted from the very beginning that it had been carried out by a Basque terrorist organization, though evidence was lacking and the attack did not fit the pattern of attacks carried out by that organization. For years after, some members of the People's Party and of the media fed the paranoid belief that it had been a conspiracy by State security services. With the unforeseen loss of the 2004 general election, the People's Party also lost the chance to elect two judges to the Constitutional Court, in the Government's turn, to replace those ending their term of office on 8 April 2004.

Second, the socialist party in Catalonia had allied itself with nationalist parties to govern the regional government with the promise of broadening devolution through a new statute of autonomy, a measure the conservative party strongly opposed. The statute of autonomy of Catalonia was approved in the Parliaments of Catalonia and Spain and later by the Catalonian people by referendum in June 2006. To be sure, the text approved by 90 % of the members of the Parliament of Catalonia was quite different from the text approved later by the Parliament of Spain and the people of Catalonia, to the extent that one of the two Catalonian nationalist parties rescinded its support to its ratification in the referendum. While the conservative party had (and has) relatively little support in Catalonia, it is, however, one of the two main State-wide political parties, along with the socialist party. Even if the Catalonian statute of autonomy had been approved by the Spanish Parliament and by the people of Catalonia in a referendum, it lacked the support of the conservative party.

Even before the statute of autonomy of Catalonia was passed, the conservative party had already begun a massive campaign

against it, obviously expecting big electoral gains in other regions of Spain. The campaign included popular agitation, such as the collection of signatures against its approval and calling for a boycott against Catalonian products. When the statute was finally passed, the conservative party challenged it before the Constitutional Court. More than two hundred provisions were entirely or partially questioned. The conservative party even challenged provisions identical to those in the statutes of autonomy of other autonomous communities that it had endorsed. Certainly, more than a handful of provisions were questionable from a strict constitutional perspective, but there was no precedent for such a massive challenge against a statute of autonomy (which must be approved by the Parliament of Spain and in some cases, like in Catalonia, ratified by the electorate). Very symbolically, it also included a constitutional complaint against the definition of Catalonia as a national entity included in the preamble of the statute.

When proceedings before the Constitutional Court began, there was a succession of externally driven disruptions to the functioning of the Court. Said disturbances included direct and indirect attempts to condition judges' work and to alter the majority of the Court including requests for recusal of judges, aggressive press campaigns, leaks to the media of draft rulings, up to three-year-long delays to renew judges and legal amendments to keep the Presidency of the Court unaltered during the political deadlock.

The first struggle came about through constitutional appeals submitted by members of the Parliament belonging to the People's Party against amendments to the Organic Law of the Constitutional Court of 2007 and subsequent amendments to the Rules of the Senate. Those amendments aimed at offering the right to propose candidates to the Constitutional Court before the Senate to the assemblies of the autonomous communities

and at keeping the Presidency and Vice-presidency of the Court unaltered while the partial renovation of the Court was delayed or in a deadlock. The proceedings of said constitutional appeals were extremely tense.[86]

First of all, in a letter, two constitutional judges requested that the President and Vice-President of the Court resign, allegedly for the content of the amendment itself and for the explanation given by them – an unprecedented step in and of itself. Second, the President and Vice-President of the Court abstained from adjudicating on the constitutionality of a provision that affected them. Third, five crossfire requests for recusal of constitutional judges were submitted: one by the Government against two judges, and the other by the applicants against three different judges. The recusals were not grounded on the individual lack of impartiality of the affected judges, but on their ideological or partisan adscription. The Court rejected the request for recusal against the three judges and accepted the recusals against the two judges that had asked for the resignation of the President and Vice-President.[87] As a consequence, the Court adjudicated on the constitutionality of the controverted amendments of such a relevant piece of legislation with only eight judges, the minimum quorum for the Court.[88] By a majority of five judges to three, it ruled that the amendments were constitutional.[89] The minority submitted tough dissenting opinions.

As far as the central struggle is concerned – the appeal of the statute of autonomy of Catalonia –, the final decision was rendered on 28 June 2010 by only ten judges, since one of them

---

86 See *Estrada Marún*, cit., pp. 281-290.

87 Orders 443/2007 and 81/2008.

88 Art. 14 of the Organic Law of the Constitutional Court.

89 Judgment 49/2008.

had been successfully recused[90] and other had passed away, not being replaced until 2012. Of the ten sitting judges, the term of office of four of them had long expired, since political deadlock had blocked the appointment process until the Constitutional Court could hand down its pending decision on the statute of autonomy of Catalonia. The Court did not start to return to normal until Judgment 31/2010 on the Catalonian statute was delivered, and four new judges were finally appointed after a delay of more than three years. They were finally sworn into office in January 2011.

In the meanwhile, the terms of office of four other judges had also expired. In June 2011, when the delay to appoint their successors had reached seven months, the affected judges tendered their resignation, which was ultimately rejected by the President of the Court to guarantee the continuity and stability of the institution.[91] In May 2012, however, it was the Court itself which, in a press note, insistently reminded of the constitutional duty to renew the Court on time and warned it would take steps, 'however drastic', to remedy the situation.[92] Finally, after a twenty-month delay, new constitutional judges were appointed in July 2012.[93]

Still, in June 2012 tensions again reached a peak – complete with press campaigns against constitutional judges – when the Court, by a slim majority of 6 to 5, allowed a hitherto forbidden

---

90 Order 26/2007, with regard to *Pablo Pérez Tremps*. On this Order, see *Luis E. Delgado del Rincón*, 'La recusación de los magistrados del Tribunal Constitucional (comentario al ATC 26/2007, de 5 de febrero)', (2008) Revista Española de Derecho Constitucional 28, pp. 347-394.

91 *Estrada Marún*, cit., pp. 201-202.

92 *Estrada Marún*, cit., pp. 202-203.

93 In fact, one of these appointments corresponded to the vacancy left by the death of *Roberto García-Calvo Montiel* in May 2008, which was therefore filled after a delay of four years and two months.

Basque political party to take part in elections and annulled the prohibition by the Special Chamber of the Supreme Court.[94] In press declarations, one regional President in the conservative party harshly attacked the judge-rapporteur accusing her of manipulating the assignment of cases and of drafting a judgment of poor quality. She even asked for the transformation of the Constitutional Court into a chamber of the Supreme Court, a court that would be closer ideologically to the conservatives.[95]

This was the starting point for a populist outcry that has appealed to certain groups. Since then, other leading politicians from the centre-liberal party *Ciudadanos*[96] have called for the elimination of the Constitutional Court from time to time. The emergent right-wing extremist party *Vox* has even formally included this proposal in its party programme. They convolutedly argue that the Court is politicised, in as far as its members are appointed by political parties and it amends the decisions of both the judiciary and the legislature despite not belonging to either. Nevertheless, as previously argued, the Constitutional Court is increasingly 'being captured' by the Supreme Court; this may be an indirect way of pursuing the transformation of the former into an extension of the latter.

3. Challenges from the territorial powers: two kinds of confrontation

National and territorial authorities have presented many clashes of jurisdiction to be adjudicated by the Constitutional Court. Two

---

94 Judgment 138/2012.

95 *El País*, 21 June 2012. https://elpais.com/politica/2012/06/21/actualidad/1340288816_772549.html.

96 *Albert Rivera* and *Juan Carlos Girauta*. See *El Mundo*, 20 August 2015. https://www.elmundo.es/espana/2015/08/20/55d4cbb646163f3c1c8b457b.html.

different kinds of clashes can be discerned: the 'ordinary' confrontation between national and territorial authorities about the interpretation of the Constitution on the extension of competences and powers that it is inevitable in any complex, multilevel polity, on the one hand, and the 'extraordinary' confrontation in which it is the supreme rule of the State itself which is rejected, on the other. The first type of confrontation may lead to contraventions, but a Constitutional Court should generally be able to solve them. By contrast, it is a much more difficult task for a Constitutional Court to address a direct challenge to its authority or the base of it, the normativity of the Constitution. The Constitutional Court raised the point in Judgment 259/2015 (legal ground no. 6) and repeated it in Judgment 114/2017 (legal ground no. 5):

> This violation of the Constitution is not, as is usually the case with contraventions of our fundamental rule, the result of a misunderstanding of what the Constitution imposes or allows in a given circumstance, but rather the result of an outright rejection of the binding power of the Constitution itself, which has been expressly set at odds with a power claiming to hold sovereignty and to constitute the expression of a constituent dimension from which a blatant repudiation of the current constitutional system has taken place. This is an affirmation by an authority with pretensions of founding a new political order, and for that very reason, of being released from all legal ties.

This may not be a rhetorical distinction at all. Judgment 114/2017 argued that legal acts expressing an outright rejection of the binding power of the Constitution itself could not claim for themselves the presumption of constitutionality which generally accompanies any legislative act (legal grounds no. 2 and 5).

Both types of confrontation are not exclusionary: while the Constitutional Court was quashing declarations of sovereignty or independence or laws preparing for it, ordinary business went on in parallel at the Court and ordinary conflicts of power were solved, in many occasions, in favour of Catalonian institutions.[97] This confirms the above-mentioned conclusion that constitutional judges are restrained by factors other than party or ideological alignment (such as precedent, lack of discretion, dissent aversion, etc.), and that sometimes there is no room for them to reflect their political preferences in their decisions, even in dire circumstances.

a) The 'ordinary confrontation': the Basque Country as the primary agent

The relationship between the Constitutional Court and especially assertive autonomous communities, like the Basque Country or Catalonia, has never been easy.

One of the reasons for the speedy set up of the Constitutional Court in 1980 was the passing of the first two statutes of autonomy, those of the Basque Country and Catalonia, in 1979. From the very beginning, there was an awareness that adjudication through the Court would be very much required.[98] The Spanish decentralisation model, or 'state of autonomies,' is so open-ended that too much was devolved to the political process itself,

---

97 This was the case, for the last four years, of Judgments 25/2015, 61/2015, 85/2015, 7/2016, 18/2016, 20/2016, 87/2016, 95/2016, 120/2016, 9/2017, 34/2017, 53/2017, 54/2017, 68/2017, 79/2017, 81/2017, 110/2017, 152/2017, 14/2018, 15/2018, 30/2018, 33/2018, 55/2018, 62/2018, 64/2018, 69/2018, 71/2018, 88/2018 and 132/2018.

98 *Bonifacio de la Cuadra* wrote in *El País* of 30 December 1979 on the 'urgent need of the constitutional arbiter'. See *Bonifacio de la Cuadra*, Democracia de papel (Madrid: Catarata 2015), p. 32.

with all the advantages and disadvantages that come along with it. The Constitutional Court has contributed enormously to the implementation and rationalisation of that process and, lastly, to the definition of the 'state of autonomies'.[99] Nevertheless, some autonomous communities, especially the Basque Country and Catalonia, do not accept the low-level decentralisation that the main State-wide political parties have come to endorse; they demand the effectiveness of devolution and the strict observance of all powers constitutionally entrenched to them. Additionally, cultural, educational and linguistic issues provide for further occasions for centre-periphery quarrels. All these factors together 'guarantee' an immense number of competence and territorial conflicts.

Even if they are committed to making federalism work, constitutional, supreme and supranational courts promote centralisation more than the autonomy of the relevant constituent parts.[100] This is understandable and, to some extent, unavoidable in all kinds of polities, even more so in traditionally unitary ones. Nonetheless, in comparative terms it is unique to the Spanish model that autonomous communities do not take a relevant part in the appointment of members of the body that ad-

---

99 See *Ignacio Borrajo Iniesta*, 'Adjudicating in Divisions of Powers: the Experience of the Spanish Constitutional Court', in *A. Le Sueur* (ed.), Building the UK's New Supreme Court. National and Comparative Perspectives (Oxford: Oxford University Press 2004), pp. 145-72.

100 For an introduction to the subject, see *N. Aroney* and *J. Kincaid* (eds.), Courts in Federal Countries. Federalists or Unitarists? (Toronto: University of Toronto 2017). On the specific case of Spain, see two contrasting studies, the chapter by *E. Casanas Adam*, 'The Constitutional Court of Spain: From System Balancer to Polarizing Centralist', ibidem, pp. 367-403; and *J. López-Laborda, F. Rodrigo* and *E. Sanz-Arcega*, 'Is the Spanish Constitutional Court of the central government against the autonomous communities?', (2018) Constitutional Political Economy 29, 317-337.

judicates on centre-periphery disputes. It is crucial that the composition of the Constitutional Court reflect the interests and worries of the Spanish nationalities and regions, through the sensitivity and legal expertise of the constitutional judges, for a number of reasons (lack of participation of autonomous communities in federal legislation, lack of political and legal safeguards for autonomous communities other than the constitutional jurisdiction itself, the high number of competence disputes between the State and autonomous communities).

With regard to these general considerations, it may, perhaps, not be surprising that Basque institutions decided at some point not to challenge any more legal State acts before the Constitutional Court, as they considered that the constitutional jurisdiction was a less promising venue to solve disputes than negotiation in bilateral fora. What may be surprising is that this decision was adopted as early as 1989,[101] that is, even before the end of the first decade of operation of the Constitutional Court, and that this politics of abstaining from use of the constitutional jurisdiction lasted for twenty-two years, with the sole exception of the challenge brought by the Basque Government in 2002 against the Political Parties Act.[102] Of course, this decision by

---

101 The trigger was Judgment 124/1989, of 7 July, of the Constitutional Court, which adjudicated on the scope of autonomous communities' powers to manage the economic aspects of the national security system.

102 Judgment 48/2003. Three circumstances explain this exception: first, the challenge did not involve a clash of jurisdictions, but it was based on substantive constitutional grounds; second, since the two main political parties had agreed on the Political Parties Act, it was unlikely that any other institution holding locus standi would challenge it; and third, the de facto addressees of the Act were certain Basque political parties.

Basque institutions did not stop State institutions from challenging legal acts passed by their Basque counterparts and from seeking their automatic suspension.[103]

Twenty-five years after the passing of the Constitution, Basque institutions began to stage a frontal collision between two claims of validity: the constitution-making power of the Spanish nation, on the one hand, and the right of the Basque people to freely decide on its future, on the other.[104]

The first deed that brought about this collision took place on 30 December 2004 when the Basque Parliament approved the draft 'Political Statute for the Community of the Basque Country' by an absolute majority – 39 to 35 –, with the opposition of the local sections of the socialist and conservative parties. Said draft purported an ambitious political accommodation of the Basque Country, on the basis of the recognition of a Basque identity and of the right to freely decide its future.

As it stands, Spanish autonomous communities do not enjoy the power to adopt their own autonomy statutes; they can merely approve a draft that has to be submitted for examination and approval to the Spanish Parliament, as with any other State law. Thus, in this case, the Spanish Parliament rejected the

---

103 Another imbalance of the Spanish constitutional jurisdiction concerns the different position of autonomous communities and State organs with regard to interim relief. Laws and acts of the state institutions remain effective while pending the case after they have been challenged before the Court, but laws and acts of autonomous communities can be suspended automatically if the state government simply so wishes. The Court has a five-month period to confirm or to lift the suspension.

104 On these developments, see *X. Arzoz*, 'Verfassungsentwicklung im Baskenland (2000-2009)', (2011) Jahrbuch des öffentlichen Rechts, vol. 59, pp. 603-634, and 'Autonomy and Self-determination in Spain: a constitutional law perspective', in *Peter Hilpold* (ed.), Autonomy and Self-determination – Between Legal Assertions and Utopian Aspirations (Cheltenham: Edward Elgar 2018), pp. 447-482.

whole draft without further discussion in a totality vote on 1 February 2005; the central (socialist) government chose to politically deactivate the apparent conflict between types of legitimacy: constitutional rule of law and democratic legitimacy. The previous conservative Government, however, had attempted to stop the reform process at its very beginning in 2003, challenging both the approval of the draft statute by the Basque Government and its admission for discussion in the Basque Parliament – the first legal actions in a long and complex procedure. The Constitutional Court did not admit these suits for a hearing since it considered them preventive and incompatible with the right to free discussion of political issues in parliamentary democracy,[105] avoiding this clear attempt at instrumentalisation of the constitutional jurisdiction in this political struggle.

The second deed took place on 27 June 2008; the Basque Parliament passed a law concerning the regulation on and the calling of a popular consultation, in order to consult the people on the initiation of a negotiation process to achieve peace and political normality. The law reflected the same conceptions underlying the failed draft Statute: the right of the Basque people to freely decide their future, a bilateral relations model between the State and the Basque Country, etc. In less than four weeks after its publication, the Constitutional Court had unanimously declared the law unconstitutional on competence, substantive, and formal grounds.[106]

---

[105] Order 135/2004. Five judges formulated a total of three dissenting opinions. For commentary in English on Order 135/2004, see *Silvia Acierno* and *Julio Baquero Cruz*, 'The Order of the Spanish Constitutional Court on the proposal to convert the Basque Country into a freely associated community: Keeping hands off constitutional politics', (2005) International Journal of Constitutional Law 3, pp. 687-695.

[106] Judgment 103/2008. In this regard, see *Alberto López Basaguren*, 'Sobre referéndum y Comunidades Autónomas: la Ley vasca de la

In both cases, the attitude of Basque institutions was fully respectful of the language of the Constitution. They provocatively explored the limits of the constitutional framework on the basis of their political conceptions but did not dare to break with it. In particular, they did not disobey a single Constitutional Court ruling, not even the one declaring the law calling for a popular consultation unconstitutional and voiding it. The Basque nationalist party realized that they had driven into a dead-end road and pulled back. This was not very difficult since both failures had been the sole initiative of the then President of the Basque Government and, in the elections that soon followed, another party took over the Government; as a consequence, the former President retired from the front line of politics and paved the way for his party to reshape the agenda.

b) The 'extraordinary confrontation': the Catalonian secessionist movement

Traditionally, political life in Catalonia has been less tense and polarised than in the Basque Country for several reasons – above all, due to the absence of terrorist activities against large segments of the population –, and Catalonian political forces and institutions have generally tended to avoid confrontational and dissonant tones in their relationship with central institutions. The reform process for their statute of autonomy was also less disruptive than the Basque one – which failed resoundingly – both in substantive and procedural terms, in so far as it aimed

---

"consulta" ante el Tribunal Constitucional (consideraciones sobre la STC 103/2008)', (2009) Revista d'estudis autonòmics i federals 9, pp. 202-240; *Javier Corcuera Atienza*, 'Soberanía y autonomía. Los límites del "derecho a decidir"', (2009) Revista Española de Derecho Constitucional 86, pp. 303-341; Javier Tajadura Tejada, 'Referéndum en el País Vasco', (2009) Teoría y Realidad Constitucional 23, pp. 363-385.

to maximize its autonomy within the constitutional framework; the draft was carefully prepared, drafted, discussed, and bargained in Catalonia over three years (2003-2006), and the final text was bargained with, and passed by, the Spanish Parliament and later ratified in a referendum by the Catalonian people.[107]

Nevertheless, as previously mentioned, the statute of autonomy was unprecedentedly challenged before the Constitutional Court by the People's Party. When the five hundred-page-long Judgment 31/2010 of the Constitutional Court on the constitutionality of the Catalonian Autonomy Statute was finally delivered on 28 June 2010[108] – four years after the challenge had been brought –, it disappointed many groups, though for opposing reasons.[109] It annulled fifteen provisions, although in most

---

[107] See *Xabier Arzoz*, 'Das Autonomiestatut für Katalonien von 2006 als erneuter Vorstoß für die Entwicklung des spanischen Autonomiestaates', (2009) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 69:1, pp. 155-193; and *César Colino*, 'Constitutional change without constitutional reform: Spanish federalism and the revision of Catalonia's statute of autonomy', (2009) Publius: Journal of Federalism 39:2, pp. 262-288.

[108] A partial translation of the judgment into English can be downloaded in http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2862010en.aspx.

[109] Spanish bibliography on Judgment 31/2010 is large. Four Spanish legal journals devoted special issues to the judgment: (2010) Revista catalana de dret públic, special issue; (2011) Revista d'Estudis Autonòmics i Federals 12; (2011) Teoría y Realidad Constitucional 27; and (2011) Revista de Estudios Políticos 151. In addition, see *Rosario Tur Ausina* and *Enrique Álvarez Conde*, Las consecuencias jurídicas de la sentencia 31/2010, de 28 de junio del Tribunal Constitucional sobre el Estatuto de Cataluña: la sentencia de la perfecta libertad (Cizur Menor: Aranzadi-Thomson Reuters 2010); *Enrique Álvarez Conde* and *Cecilia Rosado Villaverde*, Estudios sobre la Sentencia 31/2010, de 28 de junio del Tribunal Constitucional sobre el Estatuto de Autonomía de Cataluña (Madrid: Universidad Rey Juan Carlos 2011); *Pierre Subra de Bieusses*, 'La sentence du Tribunal

cases not completely but with regard to specific aspects, and imposed a consistent interpretation on twenty-four further provisions. The sum of annulations and consistent interpretations deprived key aspects of the reform of their meaning and legal effects.

Judgment 31/2010 unleashed a yet-unfinished cycle of tension with, and within, Catalonia. After several massive demonstrations, the Catalonian authorities initiated a unilateral move towards secession from Spain. Since then, all of their challenge initiatives have been declared unconstitutional and void by the Constitutional Court, decisions which were subsequently ignored and disobeyed by further unilateral actions. Overturned decisions include: various laws and regulations on referenda (Judgments 31/2015, 32/2015 and 51/2017); several parliamentary resolutions proclaiming Catalonia's sovereignty (Judgment 42/2014), initiating or preparing a constituent process (Judgment 259/2015 and Orders 141/2016, 170/2016 and 24/2017) or reaffirming its political objectives against their annulment by the Court (Judgment 136/2018); the holding of a public, informal consultation in November 2014 (Judgment 138/2015); the holding of a referendum on independence on 1 October 2017 (Judgment 122/2017); a law calling for a specific referendum on self-determination (Judgment 114/2017); a law ruling on the transition to a Catalonian Republic (Judgment 124/2017); and even a parliamentary declaration of independence on 27 October 2017 (Order 144/2017).[110]

The series of legal acts and resolutions quashed by the Court in the short period of three years is impressive. The legal and

---

constitutionnel espagnol sur le statut de la Catalogne (à propos de la décision du 28 juin 2010)', (2011) Revue du droit public et de la science politique en France et à l'étranger 4, pp. 935-963.

110 The web site of the Constitutional Court provides an English translation for the most relevant of these decisions.

political challenge to the supremacy of the Constitution and the authority of the Constitutional Court has been immense. The constitutional jurisdiction itself does not provide adequate remedy for such a colossal challenge. Different venues, both criminal[111] and constitutional law remedies, have been used and tested to meet the challenge. This text, however, focuses on constitutional law remedies, as they directly affect the role and independence of the Constitutional Court, starting with the reaction of the Constitutional Court to the secessionist challenge and later addressing the measures of the Spanish Government.

a) The first reaction of the Constitutional Court to the secessionist challenge was at the very beginning of the process on 25 March 2014. The Court gave a principled response. The Constitutional Court reminded that

> [t]he Constitution does not expressly cover, nor can it cover, all the issues that may arise in the constitutional order, particularly those derived from the wish of part of the State to alter its legal status. Issues of this kind cannot be resolved by the Court, whose task is to ensure that the Constitution is strictly complied with. Thus, the public powers, to particularly include the territorial powers included in the Autonomous

[111] Over twenty people including the former President and various ministers of the Government of Catalonia and the former President of the Parliament of Catalonia have been criminally prosecuted for serious crimes including rebellion, sedition and disobedience connected with the holding of a forbidden referendum on 1 October 2017. Nine of them have remained detained pending trial for, so far, more than twelve months. The Supreme Court will rule on the case against eighteen of them by the summer of 2019; the National High Court in Madrid and the High Court of Catalonia will try the remaining people.

State, are the ones entrusted with resolving any matters arising in this field, through dialogue and cooperation.[112]

This appeal to dialogue and cooperation was like 'preaching in the desert'. Neither the central government nor Catalonian institutions showed readiness for dialogue. It can be argued that Catalonian institutions were induced, by the Government's inaction, to persevere on their secessionist route. In any case, they started to disobey the Constitutional Court rulings and orders, and the Court's discourse changed accordingly.

The main argument behind the series of legal acts and resolutions quashed by the Court is that Catalonian institutions would have received a 'democratic mandate from the electorate' which would bestow on them the highest legitimacy to proceed accordingly, even unilaterally.

From a democratic point of view, this claim is not backed by evidence. Although regional elections conducted in September 2017 were seen as a plebiscite by secessionist political forces, and political parties advocating secession even obtained a narrow majority of the seats of the regional Parliament, they did not achieve a majority of the votes (48 %). The central government intervened in the functioning of the autonomous community, and new elections were held in December 2017. However, electoral results were similar. Political reality is sometimes stubborn. Said results correspond with neither the 'clear majority' principle elaborated by the Canadian Supreme Court in the opinion on Quebec[113] nor the 55 %-of-the-votes rule required by the Euro-

---

[112] Judgment 42/2014. On this judgment, see *Víctor Ferreres Comella*, 'The Spanish Constitutional Court Confronts Catalonia's Right to Decide (Comment on the Judgment 42/2014)', (2014) European Constitutional Law Review 10, pp. 571-590.

[113] Reference Re Secession of Quebec (20 August 1998), No. 25506 (S.C.C.), paras. 92 and 151.

pean Union to recognise the outcome of the independence referendum in Montenegro in 2006 nor even with the two-thirds majority within the Parliament of Catalonia required to reform the statute of autonomy of Catalonia.[114]

From a constitutional perspective, insistence on the democratic legitimacy of one's political aspirations represents a rather old form of populism. In fact, the outcome was very similar to some developments of the last few decades in South America where when left-wing movements were unable to obtain the necessary majorities to implement their projects, they generated a constitution-giving process to overwhelm the opposition and free themselves from constitutional limits. Similarly, Catalonian secessionist forces acted as if they had received a democratic mandate from citizens, and that democratic mandate was given the significance of constitution-giving momentum, allowing lawmakers to proceed towards secession from Spain undisturbed by conflicting rules in the existing constitutional order; those disagreeing with said interpretation and opposed to these secessionist acts were labelled undemocratic.

Apart from establishing the substantive grounds for the unconstitutionality of the Catalonian institutions' legal acts and resolutions appealed before it, the Court expressly tackled their alleged democratic foundation, that is, the confrontation between the supremacy of the Constitution and the democratic legitimacy of the aspirations of the Catalonian people. In Judgment 259/2015 (legal ground no. 5) the Court stated:

> In the social, democratic and rule-of-law-based State founded by the 1978 Constitution, democratic legitimacy

[114] Art. 222 of the Statute of Autonomy of Catalonia. Nevertheless, a majority of two-thirds in the Parliament of Catalonia is not enough; the Spanish Parliament by a vote and the Catalonian people through a referendum must also approve the proposed reform.

cannot be placed at odds with constitutional lawfulness to the detriment of the latter: the legitimacy of an action or policy of a public authority basically lies in whether it complies with the Constitution and the legal system. If one does not obey the Constitution, one cannot claim any legitimacy whatsoever. In a democratic conception of power, there is no other legitimacy than that established in the Constitution.

Additionally, the principle of democracy – one of the highest values of our legal system set forth in Article 1.1 CE […] – being a constitutional principle, cannot be construed in isolation from the rest of the constitutional system and its processes. As we will now go on to explain, the unconditional supremacy of the Constitution is what safeguards democracy, in that it is a source of legitimacy, due to its content, and because it contains procedures for its reform.

[…]

c) Precisely because the rule-of-law-based State is based on the principle of democracy, and as a result of safeguarding democracy itself via the rule of law, the Constitution is not an intangible or unchangeable legal text. In providing for constitutional reform, as will be expanded on further below, it recognizes and channels aspirations – fully legitimate within the constitutional framework – that seek the revision and amendment of the Constitution as established in Articles 167 and 168 CE.

From all of the foregoing it can be inferred that the alleged democratic legitimacy of a legislative body cannot be set at odds with the unconditional supremacy of the Constitution. The text of the Constitution reflects the pertinent manifestations of the principle of democracy, which cannot, therefore, be exercised beyond the bounds of the Constitution (STC 42/2014, Ground 4 a). Therefore, the legal system, with the

> Constitution at its pinnacle, cannot, under any circumstances, be considered a limit to democracy, but rather as its very safeguard.

Similarly in Judgment 114/2017 (legal ground no. 5), though a bit more expeditious since at this time the legal act appealed was not a mere resolution of the Parliament, but Law 19/2017, of 6 September 2017, so-called "on the self-determination referendum":

> […] by giving up – as stated in Ground 2 of this judgment – any presumption of constitutionality, the autonomous assembly is not entitled to legitimately claim obedience to this Law. A power which expressly refuses the law, also denies itself the possibility to be an authority worthy of observance.

b) The response of Spanish State-level institutions has been, obviously, less rhetorical and more imperative. The Spanish Constitution provides enough instruments for the political defence of the constitutional order: the proclamation of states of alarm, emergency and siege (Art. 116) and the adoption of coercive measures against an autonomous community (Art. 155). Nevertheless, the Government preferred to first explore the development of the instruments for the juridical defence of the Constitution, probably with the idea that, in this way, it would avoid its political wear and tear.

With the unique Catalonian case in mind, public opinion was persuaded to believe that the Court's rulings were not being duly complied with. Up to that point, the execution of the Court's decisions was ruled by a general provision empowering the Court to take all necessary measures to execute its decisions.[115] Nevertheless, it was considered to be insufficient or

---

[115] Art. 92 of the Organic Law of the Constitutional Court. The reading of this provision was originally the same one as in paragraph 35 of the

ineffective. Thus, in October 2015, with only the votes of the governing People's Party, the organic law of the Constitutional Court was amended to provide the Court with extended execution powers for its judgments, which can be used either at the Court's own motion or at the behest of the parties. To guarantee the 'effective fulfilment' of the Court's rulings, the new powers include the temporary replacement of any authority or public official that does not comply with a Court's ruling, the ordering of substitutive execution by the central government, and an increase in the amount of fines up to 12,000 euros.[116] The Basque Country and Catalonia challenged the amendment. The Court declared the new powers to be consistent with the Constitution[117] and later even used them for the first time to enforce its prohibition of the referendum on independence of 1 October 2017.[118] Nevertheless, the Venice Commission raised doubts on the attribution of said powers to the Constitutional Court, declaring it to be unusual in European constitutional jurisdiction models on the grounds that 'the attribution of the power of execution of its decisions to the Constitutional Court may seem to be an increase of power at first sight. However, the division of competences of adjudicating on the one hand, and of executing

---

German Law of the Federal Constitutional Court, from which it was taken.

116 See Art. 92 of the Organic Law of the Constitutional Court, as amended by Organic Law no. 15/2015, of 16 October 2015.

117 Judgments 185/2016 and 215/2016, both with three dissenting votes.

118 Orders 126/2017 and 127/2017. In 2018, the 3rd Section of the European Court of Human Rights dismissed the individual application no. 70219/17, Montserrat Aumatell i Arnau vs. Spain, submitted by one of the individuals whom a daily penalty (*astrainte*) of 6,000 euros had been imposed to achieve the full compliance with a Constitutional Court's previous injunction not to take part in the electoral supervision of the unconstitutional referendum of 1 October 2017; nevertheless, the penalty had been lifted since she resigned immediately from the electoral body she had been appointed to, before she submitted her individual application to the ECHR.

its results [on the other,] strengthens the system of checks and balances as a whole, and in the end, also the independence of the Constitutional Court.'[119]

In the end, the extension of the Court's execution powers was not enough. The continued disobedience of the Constitutional Court's rulings prompted the State Government, with the previous approval of the Senate, to adopt exceptional measures of coercion against Catalonia's Government and Parliament under Art. 155 of the Constitution and to call for new elections in Catalonia on 27 October 2017. This has yet to help clear up the situation; the elections held in December 2017 resulted in the same composition of the Catalonian Parliament, with a majority of the popular vote going to non-secessionist parties and a majority of seats going to Catalonian secessionist parties. In any case, the new Government has not broken with the old one nor with its plans of secession.

[119] Opinion 827/2015 of the European Commission for Democracy Through Law (Venice Commission), on the Law of 16 October 2015 amending the Organic Law no. 2/1979 on the Constitutional Court, point 77. Strasbourg, 13 March 2017.

IV. Conclusion

A Constitutional Court cannot remain totally insulated from political actors. In all democracies, appointment of constitutional judges is reserved for political organs, mainly legislative chambers, as a means to guarantee the legitimacy of the institution. Over the short history of the Spanish Constitutional Court, there have been better periods and worse periods as far as its independence is concerned. The judges of the Constitutional Court have the duty to defend their impartiality and their dignity against interference (Art. 22 of the Organic Law of the Constitutional Court). Nevertheless, criticism of politicisation should not be directed only at the Court. It is not the Court which politicises itself, but rather leaders of political parties and the media who try to interfere. The independence and proper functioning of a Constitutional Court is not only a matter of institutional design, but above all, a question of ethics and self-restraint. Both cultural changes and institutional reforms are necessary.

A minimum reform package for improved independence and functioning of the Spanish Constitutional Court should include the following elements. First, political parties should progressively eradicate the culture of appropriating posts in constitutional bodies such as the Constitutional Court. To that effect, more transparency in the selecting procedure, more autonomy for parliamentarians to propose and veto candidates, and more control by civil society may be instrumental in this regard. Second, constitutional judges must only be appointed by the two legislative chambers of the State, given that segmented election of judges has not prevented their patrimonialisation by political parties. Third, half of the judges should be elected by a Senate that truly represents the autonomous communities, and in that election, expertise and sensitivity in the promotion of autonomy should be decisive. Fourth, a limitation on the number of career

judges sitting on the Court and a retirement age for constitutional judges, consistent with that governing the retirement of university professors and judges of the Supreme Court, should be established, and last but not least, political parties must let the Court do its job.

A Constitutional Court has relevant tasks to fulfil in a democracy, but it cannot solve all the problems that may arise in a constitutional order. It is not an alternative nor does it provide institutional compensation for failing constitutional dialogue or lacking constitutional amendments, nor does it increase the Constitutional Court's authority to make it the only venue for dealing with serious challenges to the normativity of the Constitution, challenges that constitute a deep-seeded political problem.